

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DONALD YORK EVANS, et al.,

Plaintiffs,

vs.

INMATE CALLING SOLUTIONS, et al.,

Defendants.

3:08-CV-0353-RCJ (VPC)

ORDER

Before the court is the motion of plaintiff, John Witherow, (“Mr. Witherow”) for reconsideration of motion for leave to file third amended complaint (#142). The following defendants filed opposition memoranda: Howard Skolnik, Don Helling, William Donat, Brian Henley, and Lea Baker (“NDOC defendants”) (#146); Inmate Calling Solutions, LLC (#147); and Embarq Payphone Services, Inc. (#149). Mr. Witherow replied (#s 151 & 152). For the reasons set forth below, Mr. Witherow’s motion for reconsideration is denied.

I. Procedural History

Mr. Witherow filed his original complaint on June 25, 2008 (#1) and subsequently filed an amended complaint on December 19, 2008 (#33). Thereafter, the court granted Mr. Witherow’s motion to proceed *in pro per* (#60), and also granted Mr. Witherow leave to file a second amended complaint, which he filed on May 5, 2009 (#80). Two defendants, Inmate Calling Solutions, and Global Tel Link, filed motions to dismiss (#s 83 & 99), and Embarq filed a combined motion to dismiss and for summary judgment (#85).

On October 2, 2009, this court issued a report and recommendation granting the motions to dismiss of Inmate Calling Solutions and Global Tel Link, and it granted Embarq’s motion to dismiss, but denied its motion for summary judgment (#117). Mr. Witherow objected to the report and recommendation (#118), which the District Court overruled (#122). Mr. Witherow then filed a motion

1 for clarification concerning whether the District Court's order permitted Mr. Witherow to amend his
2 claims (#123). Before the District Court issued its order on the motion for clarification, Mr. Witherow
3 filed a motion for leave to file a third amended complaint (#127). On December 23, 2009, two weeks
4 after Mr. Witherow filed his motion for leave to amend, the District Court granted the motion for
5 clarification, and responded in answer to Mr. Witherow's question whether the District Court's order
6 adopting the report and recommendation permitted Mr. Witherow to amend his complaint, "It did not"
7 (#134). In light of the foregoing, this court denied as moot Mr. Witherow's motion for leave to file a
8 third amended complaint (#141).

9 Mr. Witherow now seeks leave for reconsideration of his motion for leave to file third amended
10 complaint.

11 **II. Discussion and Analysis**

12 The Federal Rules of Civil Procedure do not contemplate reconsideration of interlocutory orders,
13 such as an order granting a partial motion to dismiss. *See, e.g.*, Fed. R. Civ. P. 60(b) (specifying that this
14 rule only applies to "a final judgment, order, or proceeding"). However, a district court "possesses the
15 inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it
16 to be sufficient" so long as it has jurisdiction. *City of Los Angeles, Harbor Div. v. Santa Monica*
17 *Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001). This plenary power derives from the common law, and
18 is not limited by the provisions of the Federal Rules of Civil Procedure, so long as it is not exercised
19 inconsistently with those rules. *See id.* at 886-87. Although several districts in the Ninth Circuit have
20 adopted local rules governing reconsideration of interlocutory orders, *see Motorola, Inc., v. J.B. Rodgers*
21 *Mechanical Contractors, Inc.*, 215 F.R.D. 581, 583-85 (D. Ariz 2003) (collecting examples), this court
22 has not done so. Instead, it has utilized the standard for a motion to alter or amend judgment under Rule
23 59(e) when evaluating motions to reconsider an interlocutory order.

24 A motion to reconsider must set forth the following: (1) some valid reason why the court should
25 revisit its prior order; and (2) facts or law of a "strongly convincing nature" in support of reversing the
26 prior decision. *Frasure v. U.S.*, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003). Reconsideration may be
27 appropriate if (1) the court is presented with newly discovered evidence; (2) has committed clear error;

1 or (3) there has been an intervening change in controlling law. *Kona Enterprises, Inc. v. Estate of*
2 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). “There may also be other, highly unusual, circumstances
3 warranting reconsideration.” *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255,
4 1263 (9th Cir. 1993). A motion for reconsideration is properly denied where it presents no new
5 arguments, *see Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985). By the same token, however,
6 it “may *not* be used to raise arguments or present evidence for the first time when they could reasonably
7 have been raised earlier in the litigation.” *Kona Enterprises, Inc.*, 229 F.3d at 890. As the case law
8 indicates, motions to reconsider are granted sparingly. *See, e.g., School Dist. No. 1J*, 5 F.3d at 1263.

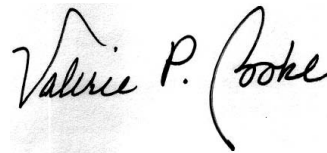
9 Plaintiff presents no new facts or law to persuade this court that it should reverse its January 20,
10 2010 order (#141). Plaintiff requested clarification of the District Court’s order, and on December 23,
11 2009, the District Court stated unequivocally that plaintiff did not have leave to file to file a third
12 amended complaint (#134). Prior to the issuance of that order, plaintiff had filed his motion for leave
13 to file third amended complaint on December 7, 2009 (#127); therefore, it is reasonable to conclude that
14 the District Court was well aware of the pending motion to amend. Plaintiff’s separate request for leave
15 to amend was properly deemed moot, because the District Court had already considered the issue.

16 **III. Conclusion**

17 Based upon the foregoing, and for good cause appearing, plaintiff’s motion for reconsideration
18 of motion for leave to file third amended complaint (#142) is **DENIED**.

19 **IT IS SO ORDERED.**

20 DATED: April 27, 2010.

21 

22 _____
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28